IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE R. WILLIAMS, et al., Appellants, vs. PACIFIC MARITIME ASSOCIATION, a nonprofit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al., Appellees.	No. 20719

SUPPLEMENTAL BRIEF

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Pursuant to leave heretofore granted, appellees file this supplemental brief in which we shall analyze Vaca v. Sipes, ____ U.S. ____, 17 L.ed 2d 842 (1967) in the light of the factual background out of which this case arose and the bases upon which the court below granted summary judgment.

1. The employe in Vaca claimed: (a) the union breached its duty to represent fairly the employe's interests in the grievance-arbitration proceedings, (b) this breach of duty precluded his getting an administrative remedy for what everyone conceded to be a contract violation, and (c) the jurisdiction of the courts to provide a remedy under §301 for such a violation should not be frustrated in these circumstances.

In Vaca v. Sipes, there was no disagreement in the Supreme Court that the employer, by discharging the plaintiff-employe, violated the terms of the collective bargaining contract then in effect and covering his work. The case arose as follows: the plaintiff-employee "alleged that he had been discharged from his employment . . . in violation of the collective bargaining agreement then in force . . ." (17 L.ed 2d at 848). At the request of the employe, the union processed the grievance into the fourth step of a five-step grievance procedure. However, at that point, over the employe's objections, the union's executive board determined that it would not submit the issue into the fifth step of arbitration. The employe filed a suit against his union for violating its duty to represent him fairly in the grievance proceedings related to that alleged breach of the collective bargaining contract.[1/]

The jury verdict for the employe was set aside on the ground that the subject matter of the suit was within the exclusive jurisdiction of the National Labor Relations Board under the rule of San Diego Building

1/ He also filed a suit against the employer for discharging him in violation of the collective bargaining contract. This suit was still in a pre-trial stage when the Vaca opinion was rendered (____ U.S. ____, 17 L.ed 2d 849, fn.4).

Trades Council v. Garmon, 359 U. S. 239 (1959). The Supreme Court of Missouri reversed. It held that there was no pre-emption by the Labor Board, that the defense of failure to exhaust contractual remedies was inappropriate on the facts of the Vaca case, and that the evidence supported the verdict.

The United States Supreme Court granted certiorari and reversed. As to pre-emption regarding the §301 issues and facts before it, the majority opinion agrees with the Missouri Supreme Court . It reverses on the ground that the defense of failure to exhaust the contract's grievance-arbitration procedure was sound because a breach of the duty of fair representation in the union's handling of the grievance was not shown.

The Vaca holding on pre-emption is not all-encompassing. First, it is limited to contract violation cases. Only such cases are within §301 court jurisdiction. The Vaca opinion gives no support to a contention that a charge of breach of the duty of fair representation by the union, unrelated to any underlying breach of contract by the employer, is sufficient to confer §301 jurisdiction. Second, Vaca is limited to cases where the union, in handling the employe's grievance, breached its duty of fair representation and so wrongfully prevented the employe from exhausting the contractual remedies.

The following excerpts, in sequence, from the opinion show how the Court itself characterized the case in reaching its result (17 L.ed 2d 854-857):

"There are . . . some intensely practical considerations which . . . emerge from the intricate relationship between the duty

of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract. . . . Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB.
* * *

"If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance * * *

"However, if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. . . . The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures. * * *

". . . [T]he employee may seek judicial enforcement of his contractual rights . . . if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. * * *

". . . [T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. . . . The employee's suit against the employer, however, remains a §301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. . . . And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a §301 suit * * *

"For the above reasons, it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many §301 breach-of-contract actions. If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. * * *

"It follows from the above that the Missouri courts had jurisdiction in this case. . . . But the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the Garmon preemption doctrine inapplicable."

The opinion in Vaca in no sense holds that §301 opens the courts to litigation of every employe's grievance. Intact, is the court's traditional recognition of the vital position of the contract grievance procedure as the heart of successful labor relations (17 L. ed 2d at 854, 858). Intact, is the court's recognition that the courts cannot resolve every grievance of every dissatisfied employe. Intact, although not relevant in the instant appeal is the principle that the union must be free to weed out the bad from the good grievances and in good faith weigh the interests of the entire bargaining unit in administering the contract (859-860). Intact, is the union's broad discretion in negotiating and amending the contract. Intact, is the principle that the collective bargaining system "of necessity subordinates the interest of the individual employee to the collective interests of all employees in a bargaining unit" (853). The courts are open to hear an employe's attack on a decision in the grievance machinery only if he can show 1) that his union breached the duty of fair representation in handling his claim through the grievance machinery, and 2) this breach precluded him from obtaining an arbitration award.

2. The appellants in this case were deregistered and went into court without exhausting the contract grievance machinery available to them.

This appeal involves the status of 51 men who worked for employers affiliated with Pacific Maritime Association.

In 1959, 742 men, including appellants, were registered as Class B longshoremen under the collective bargaining contract between PMA and ILWU. Thereafter, the parties to that contract engaged in negotiations with respect to the mechanization of the industry and the procedures under which there could be a reduction in the manhours necessary to handle any particular amount of cargo. At the same time they negotiated an agreement to cushion the adverse effects of such mechanization upon the employes. In this background, the parties imposed a freeze on registration so that they might study the effects of this collective bargaining. During the period of the freeze, which continued from shortly after the B men were registered in 1959 until the spring of 1963, there was gradual attrition among the total number of B men in San Francisco. Thus, by early spring of 1963, the number of B men was reduced to 564.

Early in 1963, the matter of increasing the number of men on the registered list and moving some of the B men to A status was agreed upon. It was determined that the B men in San Francisco would be reviewed with respect to their past performance on the job, those who had met the standards agreed to would be advanced to A and

those who did not meet these standards would be eliminated and other men would be employed to take their place. This procedure was well known among the longshoremen as indicated by a letter that Stanley Weir, one of the appellants, sent to the President of Local 10. "Dear Brother Kearny: I am writing this letter to ask for your help in clearing my name. At last night's Local 10 meeting the International President, Harry Bridges, made it very clear that the Local's investigating committee has rejected the men it considered chisellers, dues delinquents and contract violators. I cannot disagree, but the committee can make mistakes as was pointed out in the meeting." (R. 297). Four hundred sixty seven men who met the standards were advanced to A status. Ninety seven men (including appellants) who did not meet the standards were deregistered.

Prior to this action, the men all filed written applications to advance to A and were given a written notice of whether they would advance or not advance. Those whom the Committee determined to eliminate in the first review of the facts were given an opportunity to face the joint committee and hear an oral statement of the facts involved; they were given a further opportunity to go over the detailed facts with the men maintaining the records and record books that were involved (R. 89). Thereafter, decisions were made on this investigation and hearing. In some cases, after a review of the facts, the joint committee reversed its prior decision. None of appellants was in this category, however (R. 89-90). The joint committee gave notice of its decisions and of applicable grievance

procedure to the affected men, including appellants (R. 89, 91a - 91c). All of the appellants filed grievances saying:

> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all of the men involved by the same standards.
>
> "I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination." (R. 2, 4L)

Appellants thereafter carried these grievances up through a decision by the Joint Coast Labor Relations Committee. A summary of the record as to the actions of the employers, the unions, the appellants and the other four Class B men who were deregistered during this period are set out in Appendix B. This Committee upheld the decision to deregister them (R. 86-91). With a written notice of this decision each man was advised that he could appeal the matter to the arbitrator (R. 83-85). During all these steps appellants were represented by counsel and notices of all actions by the committees, including the final decision and notice of the right to appeal to the arbitrator, were given to counsel as well as to appellants themselves. Appellants chose not to exhaust the contract grievance machinery (R. 83). They thereafter took their claims to the Labor Board and the Board concluded that their claims were barred by the period of limitations (R. 176-179). Before they filed charges with the Board, another group identically situated had timely gone to the Board, which took jurisdiction and on the merits sustained the validity of the actions taken by the employers and the union. Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 10 [Johnson Lee], 155 NLRB 117, 60 LRRM 1483 (1965).

Appellants say that they are excused from having failed to exhaust their contract remedies because: (1) Section 13 of the contract and §17.4, etc. implementing §13 do not apply to them; and (2) that the time that elapsed between the filing of their grievances and the commencement of the hearing at the Port Committee level was too long.

(1) Section 13.1 clearly covers these claims. That section reads:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

The nature of the claim asserted - deregistration because of opposition to the union's collective bargaining position on mechanization - clearly falls within the scope of this provision. The Weir affidavit shows that if his claim is anything, it is a claim of discrimination because of "activity . . . against the Union".*/

Appellees flatly deny any contention that there was discrimination of any sort towards Weir or towards any appellant; however, the merits of the claim need not be discussed. Appellants' forum for such a discussion is not in this Court. Their forum was arbitration. They were clearly told, both individually and through their counsel, that they could take the decision of the Joint Coast Labor Relations Committee regarding §13.1 to the arbitrator (R. 84). They chose not to do so although this was the clear and obvious contractual remedy, which

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*/ Stanley Weir was the only appellant who filed an affidavit.

federal law favors and requires. The very least that they were required to do was to attempt to go to Professor Kagel, Republic Steel Co. v. Maddox, 379 U.S. 650 (1965), Vaca v. Sipes, ___ U.S. ___, 17 L. ed 2d 842 (1967). They did not even try. If they had, and if their claims had been rejected on the theory they now espouse, they would at least have had satisfied the requirements of Maddox and Vaca. But since they failed even to make the attempt, they have no standing to maintain a §301 suit, and Judge Harris was correct in so deciding as a matter of law.*/

(2) The time involved in processing the more than 50 grievances does not excuse appellants' failure to appeal to the arbitrator. The brief that PMA filed previously sets out in detail the facts occurring during the period, starting with the decisions to review the records of the B men who had been on the job during the freeze period, continuing during the many court and administrative hearings carried on until the appellants first went to the district court, continuing thereafter during the preparation of the grievance machinery record and concluding with the appellants' decision not to go to arbitration (PMA Brief, pp. 12-16, 72-73). The time involved in handling the many grievances to develop an adequate and reasonable record with regard to these grievances was obviously necessary and reasonable in view of the complexity of the factual issues involving almost 100 dissatis-

*/ While we are confident that the courts would have to reject this contention in view of the clear language of §13.1, appellants have no right to ask the courts to make this decision.

fied men who had been deregistered. Throughout this period, the joint parties participated with appellants in all proceedings and hearings in which appellants chose to participate.

While these proceedings were going on, and during the period when the basic record with respect to the claims and counterclaims was being developed during the vigorous litigation in the unemployment insurance hearings, appellants moved into court without waiting for the grievance-arbitration machinery to move along. Neither they nor their attorney made any inquiry of the employer, the ILWU, or PMA's counsel in the unemployment insurance litigation as to the status of their grievances. Thus the court proceedings carried on while the grievance machinery was being followed, while the unemployment insurance litigation was continuing, and while the Labor Board was investigating appellants' charges and deciding the similar charges of other Class B men who were deregistered with appellants. */

There is a further complete answer to this contention. The present action is a collateral attack on the decision of the Joint Coast Labor Relations Committee. Appellants participated in the grievance procedures right up to this step. They had the chance for a final hearing before the arbitrator and voluntarily gave it up. The district judge

*/ The delay in carrying on the grievance-machinery - while all these many other proceedings involving appellants, other Class B men, the union and the employers were going on - is not a claim of repudiation of the contract by either the union or the PMA that would excuse appellants from exhausting the grievance machinery. The Vaca opinion (p. 855) indicates that "repudiation" or estoppel may be an excuse for not exhausting the grievance machinery, Drake Bakeries, Inc. v. Bakeries Workers, 370 U.S. 254, 260-263 and 6a Corbin Contract §1443 (1962). Reference to this case and the treatise indicates that the Court was talking about action that was a repudiation of the contract itself followed by a later argument that is failure to exhaust the grievance machinery precluded other action to recovery for the repudiation of the contract.

was correct in holding, as an independent ground of decision, that as a matter of law appellants were entitled to no relief because they had failed to exhaust the grievance-arbitration machinery available to them under the contract.

The doctrine requiring exhaustion of contract remedies is discussed at length in Vaca. (See 17 L. ed 2d at 854, 855, 856, 858, 859, 860.) There the employe was forced by the terms of the collective bargaining contract to rely upon the union to process the grievance for him. The Supreme Court held, in view of the fact of the union's absolute control of the grievance machinery (17 L. ed 2d at 855), and the charge that the union violated its duty of fair representation in not processing the grievance to finality, that the employe might be excused from the usual requirement of exhausting contractual remedies. Thus the Vaca holding is that the requirement of exhaustion is excused where the union has absolute control of the grievance procedure and has used that control to prevent the processing of the employe's grievance.

The requirement of exhaustion of contract remedies, as discussed in Vaca, fully supports the argument made by appellees in their earlier briefs that appellants now are barred from federal court for failure to exhaust their contract remedies. In the case at bar, where the employes were not prevented access to the grievance machinery by union action, the employe has no excuse for not exhausting his contractual remedies. Appellants were not deprived of the power to exhaust their grievance-arbitration machinery by any breach by the union of the duty of fair representation in the handling of their grievances. The grievance machinery under this contract, unlike that in Vaca, was personally available to each employe at all

times.*/ Appellants' access to it was not controlled by the union and could not be controlled by the union; no action on the part of the union was required for them to obtain a hearing before Professor Kagel.

The record shows that appellants, on advice of counsel, voluntarily chose to ignore the arbitration remedies provided under the collective bargaining contract. Appellants are therefore left to the consequences of their choice. Appellees have an absolute defense based on appellants' failure to exhaust their contract remedies. Vaca v. Sipes confirms the propriety of the district judge's ruling in this respect.

3. Appellants herein, unlike the employe in Vaca, raise no litigable issue of contract violation by the employer.

One of appellants' counts in their Fourth Amended Complaint alleges federal jurisdiction under §301 of the Labor Management Relations Act. That section reads:

> "Suits for violation of contract between an employer and a labor organization . . . may be brought in any district court of the United States."

The sine qua non of jurisdiction is a violation of a collective bargaining contract. Vaca recognizes this. Appellants recognize it and they have been hard put to define any claim of contract breach in this case.

*/ The Supreme Court opinion even recognizes - at footnote 10 with its reference to Retail Clerks v. Lion Dry Goods, Inc., 341 F.2d 715 - that not all collective bargaining contracts are similar to that in Vaca and that some, like the relevant provisions in the contract between the ILWU and the PMA, give the individual employe control of his grievance.

Appellants offer three claims of contract breach and each is manifestly without merit. They are: (1) that the standards under which they were deregistered were not reduced to writing, which is claimed to violate §22.1 of the 1961 contract; and (2) that they were deregistered even though they claimed to have met those standards because they opposed the union's mechanization agreement; and (3) that appellants raised a litigable issue in their claim made here that some of them met the 1963 standards but were nevertheless deregistered.

(1) Appellants claim they were deregistered because they were "chisellers, dues delinquents, and contract violators"*/ and that this was in breach of the contract because no formal written document, duly executed, has been produced to set out these grounds for deregistration.

Appellants' basic contract violations claim is that nothing may be done in the day-by-day administration of the collective bargaining agreement unless the parties record their actions in formal minutes or in some other neat document with signatures affixed. They refer to §22.1 of the basic contract document, the grey book, entitled "Pacific Coast Longshore Agreement" (R. 4), stating that no provision "of this Agreement" may be amended except by another written document

*/ Mr. Weir's affidavit describes appellees' action against appellants in these terms (R. 297)

executed by the parties. From this they generalize that nothing may be done in the continuing administration of the contract unless it is by written amendment of the grey book, executed by the parties. Such procedures would stultify collective bargaining. Section 22.1 of the Agreement, in no such way frustrates administration of the contract.

The grey book itself specifically recognizes that not every action taken in supplementing the contract must be done with the formality of the execution of the basic document. For instance, it specifically authorizes the sort of action utilized in adopting and applying the standards the joint committees used in reviewing Class B men to decide if they should advance to Class A. The basic document sets out a number of rules and penalties and continues with the following language:

> "17.85 The rules and penalties provided hereinabove shall be applicable to fully registered longshoremen and, except where a more stringent rule or penalty is applicable pursuant to 17.851, to limited registered longshoremen and to nonregistered longshoremen.
>
> "17.851 More stringent rules and penalties than those provided hereinabove that are applicable to limited registered longshoremen or to nonregistered longshoremen or to both such groups may be adopted or modified by unanimous action of the Joint Coast Labor Relations Committee and, subject to the control of such Committee so exercised, more stringent rules and penalties applicable to limited registered men or nonregistered men or to both groups that are provided in existing and future local joint working, dispatching, and registration rules and procedures or by mutually agreed practices shall be applicable."

The nature of this broad power to deregister limited registration (Class B) longshoremen was made expressly known to the appellants. Thus, in making his application for Class B status in 1959, such appellant expressly agreed that he understood that:

> ". . . [R]egistered longshoremen may be deregistered and . . . registration may be revoked in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted by the Association and the Union or their successors or by the Joint Port Labor Relations Committee." (R. 4k)

The contractual background as to the adoption and use of the 1963 standards is ignored by appellants. They assert the standards are invalid merely because they were not, at some date in time, set out in a formally executed, written document. The contract provisions quoted above are to the contrary.

In any event, appellants cannot complain that their records were judged by those less formally adopted standards. They do not and cannot make any claim that those standards were not reasonable ones. Appellants do not say that they were injured by the parties' failure to reduce the 1963 rules to a formally written document. The parties to any contract obviously have the right to ratify mutual agreements made by them; the date on which they ratify them is utterly insignificant. It is thus clear that appellants' first point raises no litigable issue and Judge Harris was correct, as a matter of law,

in granting summary judgment to appelles on this point.*/

(2) The second claim of breach of contract is that appellants were deregistered because of their opposition to the union's collective bargaining position on mechanization and its alleged ignoring of the interest of the B men. It is claimed that deregistration for these reasons constituted "discrimination".

There is no provision in the contract, save Section 13, that prohibits discrimination against longshoremen. A claim of discrimination, not related to §13, does not charge contract violation. Section 13 is the only

*/ It is also to be noted that the 1958 rules, on which appellants rely, include language that appellants ignore. Thus, the provisions setting forth the reasons under which limited registration (Class B) longshoremen may be deregistered or discharged include the following (R. 126-127):

"§9. De-registration of Limited Registration (Class B) Longshoremen.

"(a) A Class B longshoreman may be de-registered in accordance with the provisions of Section 16(f) of the Basic Longshore Agreement and, in addition, he may be de-registered for cause by the Joint Labor Relations Committee (in accordance with such rules or uniform procedures as may be established or followed by such Committee) if the Committee finds: * * *

"(xi) Or for any other cause; provided that neither membership or nonmembership in the union nor activity or nonactivity for or against the union, shall be a factor in considering applications for registration or in de-registration."

portion of the contract dealing with discrimination.*/

Appellants have repeatedly disavowed any breach of §13. However, they do not, because they cannot, point to any other section of the contract that was breached by "discrimination". Therefore, the "discrimination" that they say resulted in their deregistration was not a violation of the contract. Whatever else it may have been, it is not relevant to a claim of breach of contract.

(3) Appellants now argue that a third claim of contract breach exists because they purportedly met the 1963 standards.

Appellants, through argument of counsel, now refer to the affidavit of Stanley Weir, the only affidavit that any of them submitted, and point to his conclusionary statement that he did not fail to meet

*/ The inclusion of the broad language of §13.1 in the ILWU-PMA contract was merely part of the joint employer-union policy of insisting on non-discrimination in the industry. The policy is not a new one in Local 10 nor in the International Union. Charges of discrimination for race, for instance, could hardly be made as to Local 10 in San Francisco where an excess of 60% of the members are Negroes or are of other minority races.

the 1963 standards for registration as an A man.*/ Counsel cannot, of course, show that improper deregistration, even if it had occurred, would have been anything other than a violation of §13.1 of the Agreement, the section upon which they have repeatedly disclaimed any reliance.

In any event, the record sets forth the precise details of the failure of appellants to meet these standards. Appendix of PMA brief, pages 23-26; see also the findings of the Joint Coast Labor Relations Committee (R.86-91). These clear factual statements have not been controverted by appellants in any affidavits. On this second point of appellants, Judge Harris was also correct in holding, as a matter of law, that "no breach of contract is or can be pleaded" (R. 501).

*/ It is to be noted that counsel's offer of proof with respect to inflating the scope of the Weir affidavit is limited to the matter of discrimination. It in no way relates to any claim of breach of contract. In the brief it is stated, "Plaintiffs' counsel made an offer of proof wherein he offered to supply evidence that the kind of discrimination that was shown againt Mr. Weir, the unfair representation, could be shown against practically everyone of the plaintiffs, if not all of them." (Opening Brief, page 17). In the transcript he admits that he has not talked to all of them (R. T. of the proceeding of August 16, 1965, 3). Their brief asserts only that this offer served to "corroborate" Weir's affidavit (Opening Brief, page 18). Parenthetically, the offer of proof is, of course, of no value to establish a litigable issue.

In any event, the nature of this offer is clear, both in the record itself (pp. 37-38) and in appellants' opening brief (pp. 17-19). The brief continues by asserting that there was hostility "concerning the B men" (which the brief in no way suggests did not apply equally to the 450 who were advanced to Class A registration) and that this was shown by the contract amendment calling for the payment of $29,000,000 "for the benefit of the Class A longshoremen" and by the unequal treatment of B men as compared to A men. It is also claimed that Mr. Weir was the individual who expressed opposition to this contract amendment. Clearly none of this raises any issue of breach of contract as to anyone. He does not raise any breach of contract after discussing the offer of proof.

4. Appellants also fail to show that Vaca is applicable because they assert a classical, routine NLRA unfair labor practice.

The Vaca opinion spells out an exception to the doctrine of pre-emption that applies only with respect to claims of a breach of the duty of fair representation that arise in handling of grievances that are later the subject matter of a §301 suit. This is the duty that has historically been enforced by the courts and has only recently been enforced through unfair labor practice proceedings before the National Labor Relations Board (17 L. ed 2d at 852-857). We submit that there is nothing in the record to show that this is the type of unfair labor practice that appellants assert. Rather the claim is that appellants were discriminated against because they were the entire group of men who attacked the union's action in agreeing to the mechanization contract. This is a classical or traditional unfair labor practice. These allegations call for exercise of the Board's unique expertise even if, as appellees deny is the case here, the unfair labor practice in some way prevents the hearing of a grievance asserting a claim of contract violation.

It is clear from Vaca that the Supreme Court was not jettisoning the Garmon-Borden-Perko doctrine of pre-emption and that it was not saying that every time an employe complains of unfair treatment he can maintain a suit under §301. In Vaca the Court reviewed the rationale for pre-emption: the need to avoid conflicting rules of substantive labor law and the desirability of leaving the development of such rules to the agency created by Congress for that purpose. While it pointed out that there were both statutory and judically-created

exceptions to pre-emption, it said that these exceptions in no way undermine the vitality of the pre-emption rule (17 L. ed 2d 852). It said that a decision to pre-empt or not to pre-empt must turn on the nature of the particular interests being asserted and the effect upon the national labor policy of concurrent judicial and administrative remedies (17 L. ed 2d 852).

The interest in Vaca that was being asserted differs from the interest asserted here. In Vaca, the interest being asserted was that the union not refuse to take a grievance to arbitration. For that particular interest the Court found no compelling reason to apply the pre-emption doctrine, for the Board had only lately begun to assert jurisdiction over that interest and, as a result, the Board had no particular expertise in that area. The interest here asserted is that the union should not participate in discharge of employes because they had engaged in anti-union conduct. This is preeminently the type of interest that the Board has protected for over thirty years against employer interference and for twenty years against union interference. The effect on the national labor policy of asserting concurrent jurisdiction in this case would be chaotic.

The Board's reports are replete with cases in which it, applying its expertise, has developed a uniform body of federal labor law dealing with discharges of employes for union or anti-union conduct. This is not an area over which the Board has asserted its jurisdiction only recently. This Court's records, as well as the records of other circuit courts and the records of the Supreme Court, are also replete with judgments enforcing such Board orders. Just last month,

this Court enforced an NLRB order against an ILWU local in Oregon in which it was charged that the Union had refused to dispatch certain employes because they had protested against the dispatching procedures. NLRB v. ILWU Local 12, _____ F. 2d _____, No. 20914, April 18, 1967.

Thus, the premise for the refusal to apply pre-emption in Vaca is absent here. On the contrary, there is here involved the very test that Vaca enunciates for the application of pre-emption: The interest asserted is clearly protectible by the National Labor Relations Act and has in fact been protected by the Board for years and years. This interest was, on the facts of this very case, considered and passed upon adversely to appellants' contentions by the Board.

5. Subsequent actions by the Supreme Court after Vaca confirm our positions.

The opinion of the Supreme Court in Vaca must be read in the perspective of the factual situation there under discussion. Actions of the Supreme Court since its ruling in Vaca, like the opinion language quoted above, impel the conclusion that the Court was addressing itself only to factual situations involving (1) a claim of violation of a collective bargaining contract subject to litigation in the contract's grievance machinery plus (2) a claim that a union arbitrarily utilized its control of the grievance machinery to deny an employe access to it.

In our earlier briefs, appellees discussed at length the case of Woody v. Sterling Aluminum Products, Inc., 365 F. 2d 448 (8 Cir. 1966). Two parts of that case dealt with typical breach of contract claims. The first part was dismissed on the basis of "deliberate stripping" of any unfair representation allegation from the pleading in one complaint (453). The second part was dismissed after a showing by plaintiff Woody's affidavit

that he, himself, had failed to act to process the grievances (455). The opinion indicates (448-455) there was no claim that the failure to exhaust should have been excused. There was no breach of the duty of fair representation by any refusal of the union to proceed with any grievance. The grievance machinery stopped while Woody was in full control of the grievance procedures.

The third part of that case dealt with the "plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement (456). The matters alleged in this part were accordingly held to be outside §301 jurisdiction and within the exclusive jurisdiction of the Labor Board (365 F. 2d at 456-457).

On March 14, 1967, after the ruling in Vaca, the Supreme Court denied certiorari in Woody, ___ U.S. ___, 18 L. ed 2d 105. Standing by itself that might not mean too much, but it does not stand by itself. Two other things happened.

Another petition for certiorari was before the Court at this time with respect to an Ohio state court decision in Mangus v. A.C.E. Freight, Inc., 6 Ohio App. 2d 87, 216 N.E. 2nd 639 (1966). The complaint in that case charged that plaintiff suffered damages because of the refusal of the union to process his grievance against the employer and because of the act of the employer in terminating his employment. The Ohio court, citing Local 100, etc. v. Borden, 373 U.S. 690 (1963) and International Ass'n. of Bridge, etc. Workers v. Perko, 373 U.S. 701 (1963), dismissed the complaint on pre-emption grounds. On March 27, 1967, two weeks after it denied certiorari in Woody, four weeks after

it had decided Vaca, the Supreme Court granted the petition for certiorari, vacated the judgment and remanded the case for further consideration in the light of Vaca v. Sipes (35 U.S. Law Week 3343).

It is significant that in the Ohio case, like Vaca, the claim was of a breach of the duty of fair representation in a refusal by the union to process a grievance. Thus, the remand in the Ohio case is perfectly understandable; it presented a situation like Vaca and the Court entered a Vaca type order. After this action by the Court, the petitioner in Woody asked for a rehearing and cited Vaca as the circumstances of substantial and controlling effect, as required by the Supreme Court rules, to justify the granting of a rehearing.

The Woody rehearing petition, in language strongly reminiscent of that used on the first page of appellants' reply brief, states:

> "Circumstances of substantial and controlling effect have arisen during the time that the petition for writ of certiorari herein was pending. The decision and majority opinion of this Court entered on February 27th, 1967, in the case of Vaca v. Sipes, 87 S.Ct. 903 (1967), thoroughly, favorably and affirmatively answers every question presented for determination by these petitioners. The ruling of the Eighth Circuit Court of Appeals in this case is now in direct conflict with this Court's opinion in Vaca v. Sipes (supra)."

In the face of this, on April 24, 1967, the Supreme Court denied the petition for rehearing in the Woody case (35 U.S. Law Week 3377). The history of these two cases during the nine weeks since Vaca shows that the exception to applying the doctrine of pre-emption set out in that opinion has no application to the case at bar. It is equally clear from this history that the long-standing exhaustion doctrine, discussed in

Maddox, does have application because here, unlike Vaca and Mangus, the failure to exhaust was not the result of the union's refusal to process the grievance.

Conclusion

We have analyzed the Vaca opinion and holding, as well as related recent actions of the Supreme Court. We have presented several independent grounds for sustaining the decision of the district court, grounds that remain fully supported after Vaca. The failure to exhaust the grievance machinery cannot be excused. There is no contract violation. The alleged breach of the duty of fair representation is a routine, traditional unfair labor practice. This case is a Woody case, not a Vaca case.

Respectfully submitted,

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May 4, 1967

San Francisco, California

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dennis T. Daniels

APPENDICES